LOS ANGELES BAR BULLETIN

In This Issue

Vol. 34 APRIL 1959 No. 6

"Someone should tell him about Title Insurance and Trust Company"

Instead of one investment, we believe in *many sound ones.* That's why—when we're named as trustee under your client's will—a small estate gets the same diversification benefits as a large estate.

You see, we maintain and operate a Common Trust Fund. Every dollar we put in as trustee is a diversified investment. We'd like to give you more details. Just call our Estate Planning Division, MAdison 6-2411.

Southern California's TI *Oldest Trust Company*

Title Insurance and Trust Company

433 SOUTH SPRING STREET, LOS ANGELES 54

Los Angeles
BAR BULLETIN

Official Monthly Publication of The Los Angeles Bar Association, 241 East Fourth Street, Los Angeles 13, California. Entered as second class matter October 15, 1943, at the Postoffice at Los Angeles, California, under Act of March 3, 1879. Subscription Price $2.40 a Year; 20c a Copy.

VOL. 34 APRIL, 1959 No. 6

President's Page

By HUGH W. DARLING
President, Los Angeles Bar Association

IMPORTANCE OF APPOINTMENTS TO THE BENCH

HUGH W. DARLING

As with the three legs of a milking stool, each of the three branches of our enlightened form of government is indispensable. This being so it would be quite senseless to designate one branch as more important than the other two.

It is probable, nonetheless, that the judiciary strikes home more often, hence looms closer and larger in the vision of the average individual. Perhaps not many have felt directly the sting or glow of a Supreme Court decision but few have escaped being beckoned by a traffic court. And it is a rare day that news releases lack some item concerning litigation. Thus it may be said that maintenance of a bench comprising men and women of true judicial capacity and unflinching rectitude is even more important to the preservation of and respect for our form of government than maintaining the high caliber of the legislative and executive branches, important as that is.

Of the ninety Judges of the Superior Court in Los Angeles County only nine were placed there initially by ballots involving a

choice. The other eighty-one were awarded their mantels by the appointing power of one man—the Governor in office at the time. Of the forty-two Judges of the Municipal Court in the Los Angeles District thirty-nine were appointed while two went up from the Justice Court following annexation with only one being there originally by popular vote. All of the seven California Supreme Court Justices reached their elevated plateau by appointment and none of the twenty-one Appelate Justices received his or her first robe from the people in a contested election.

These figures stress the fateful responsibility gripping the Governor's conscience when making appointments to the bench. If those appointments, or any significant portion of them, are not bottomed on past or potential judicial ability the consequences could be more than mischievous.

That each appointee soon must brave the voters' scalpel is no answer, nor is comfort lodged in the fact that substantially all of our Judges have been returned to office by a vote of the people. The occupant of a court, vastly more so than an incumbent of a

Issue Editor—Frank E. Loy

legislative or executive office, is almost certain of having his term renewed. This is probably so because for the most part only lawyers are equipped to gauge the desirability of returning or retiring a Judge. But so far the heroic efforts of the Bar, fortunately not often needed, to prevent the election of an unworthy incumbent seldom have proved adequate to overcome the tendency of voters to retain a juristic office holder.

Thus, as lawyers, it is our duty, individually and collectively, to employ every proper force we possess to the end that gubernatorial appointments to the bench are based on proved, at least clearly incipient, judicial qualifications. If we make our thoughts vocal whenever a nomination issues, whether good or bad, he would be an unwise Governor who failed to take heed. A Governor who knows that the lawyers of his state, with some unanimity, will openly applaud him when he makes a good selection and publicly pounce on him when he makes a bad one should find it easier to recoil from bestowing the time honored title of Judge on a sycophant.

Since his inauguration the judicial appointments made by Governor Brown have evoked cause for encouragement. Moreover, as an able lawyer he is not insensible to the importance of a sound judiciary, although history tells us that a legal background does not always prompt a Governor to confine his notions to legal ability when in the process of filling a vacancy on the bench.

It is to be hoped that Governor Brown's apparent opposition to a qualifications commission does not presage that the grounds for encouragement are short-lived. The argument that the Governor is elected by and responsible to the people and thus should not be shackled by a commission with veto power is not without edge. Still there are those who wonder why a Governor, however well-intentioned, would hesitate to have his appointees screened by a knowing, impartial and unswerving commission if, in fact, judicial endowments will command his choice.

Enforcement of Community Property Agreements

"PLUMBING" THE PLUMER CASE

By EDWARD M. RASKIN*

The greatest burden imposed upon our courts in civil litigation has been the deluge of personal injury cases and the flood of marital litigation. For a long time litigants in marital disputes have been encouraged by the Supreme Court of California to enter into Property Settlement Agreements, subject to the approval of the trial courts, so that the settling of their controversies by mutual agreement would diminish the number of contested trials of divorce cases.

The "integrated bargain" rule was finally formulated whereby the husband and wife could enter into an agreement which, so long as it was fair and equitable to the parties involved, would necessitate the trial court's approval. With such approval, subsequent proceedings brought by either party to modify the wife's support and maintenance provisions could not be successfully maintained so long as the requirements of an integrated bargain were fully met and complied with. (Dexter v. Dexter, 42 Cal. (2) 36, 265 P. (2) 873; Fox v. Fox, 42 Cal. (2) 49, 265 P. (2) 881).

Domestic relations lawyers began to breathe a sigh of relief. Here at hand was a means of avoiding a great deal of litigation by the simple device of consummating an integrated bargain agreement to finally settle all future disputes between husband and wife as to the amount of the wife's support and maintenance, so that neither party could thereafter seek to modify such provisions. This hope and expectation was short-lived. The problem of *enforcement* of the decrees based upon and incorporating the integrated bargain agreements arose.

For the most part, divorce decrees are enforced in two ways: by the issuance of a writ of execution, and by the process of contempt. It is the latter process as applied to support and maintain provisions of a community agreement with which this article is concerned in view of a recent decision of the Supreme Court of

*L.L.B. Southwestern University Law School 1933, Member of Los Angeles and Beverly Hills Bar Associations, and State Bar of California.

California Plumer v. Superior Court, 50 Cal. (2) 631, 328 P. (2) 192—it has raised this interesting question: now that we know how to make an integrated bargain agreement, is it worth while making one if by doing so the wife, to a great extent, gives up her right to enforce the agreement by contempt? It is therefore of extreme importance to every lawyer handling a divorce case to ascertain whether he wishes his client to enter into an integrated bargain agreement, or, in fact, to enter into any agreement at all which will in any way restrict the court's power to modify *alimony or child support*, when the ultimate effect of such an agreement will also require the client to give up the remedy of the contempt process for the purpose of enforcing the agreement.

In the Plumer case the husband and wife entered into an agreement "to effect a final and complete settlement of their respective property rights, support, alimony and custody of their child, with reference to their marital status and to each other." The husband agreed to pay to the wife $200.00 a month as alimony and an additional $200.00 a month for child support. It was further provided that so long as the wife's earnings or other income did not exceed the monthly sum of $250.00, any increase in her income would not be considered a "changed condition" in connection with

any attempt by the husband to obtain a reduction in the monthly support payments for the *wife or child*.

After an interlocutory decree of divorce was entered approving the agreement and ordering the husband to pay the specified sums, the court held the husband guilty of contempt for failing to pay the sums involved. The sentence was ordered suspended upon the condition that he make the subsequently accruing payments and also the additional payment of $10.00 per month to apply on the arrearages. After a hearing approximately a year and a half later, the court vacated the suspension and ordered the contempt sentence into effect forthwith. The husband filed a petition to annul the court's order imposing the contempt sentence. The key question of the case was whether the constitutional provision against imprisonment for debt would preclude the use of contempt proceedings to enforce the husband's obligations under the divorce decree and property settlement. The majority of the Supreme Court, in an opinion by Justice Spence, held:

1. When the obligation in a Property Settlement sought to be enforced is contractual and negotiated, as distinguished from marital and imposed by law, even though the contract relates to marriage obligations, the remedy is limited by the nature of the right asserted. For *contractual* obligations it is to the contract alone, and to conventional civil proceedings for the enforcement of contract rights, that the parties must look for a remedy in the event of a breach. In such case, although a writ of execution may issue with reference to the decree, such judgment cannot support a commitment to imprisonment for failure to pay the judgment debt. However, as to payments which fall into the category of *law—imposed alimony* or based upon the statutory obligation of marital support, these may properly be held not to constitute a debt within the meaning of the constitutional provision, citing Bradley v. Superior Court, 48 Cal. (2) 509, 310 P. (2) 634.

2. *With reference to the provision for alimony to the wife*, although the monthly support payments could be reduced by court order because the parties had "expressly so provided" (Plumer v. Plumer, 48 Cal. (2) 820, 313 P. (2) 549), there was the express limitation to the effect that the court could not consider an increase in the wife's income as a "changed condition" unless her income exceeded "the monthly average of $250.00." Because of this restric-

tion and interference with the court's power to modify the alimony award to the wife in that one respect, the alimony obligation was deemed to be "*contractual* and negotiated, as distinguished from marital and law-imposed, and therefore the enforcement of such payments by contempt proceedings is precluded by the constitutional prohibition against imprisonment for debt."

3. *With reference to the provision for child support,* although the law imposes an obligation on a father to furnish such support, and said law-imposed obligation cannot be contracted away by the parents, and although the child support obligation could have been reduced by virtue of the agreement of the parties, the above mentioned contractual limitation upon the court's power to make any such reduction clearly stamped the obligation for child support payments as a *contractual* obligation, rather than a *law-imposed* obligation. Consequently the child support obligation could not be enforced by the process of contempt.

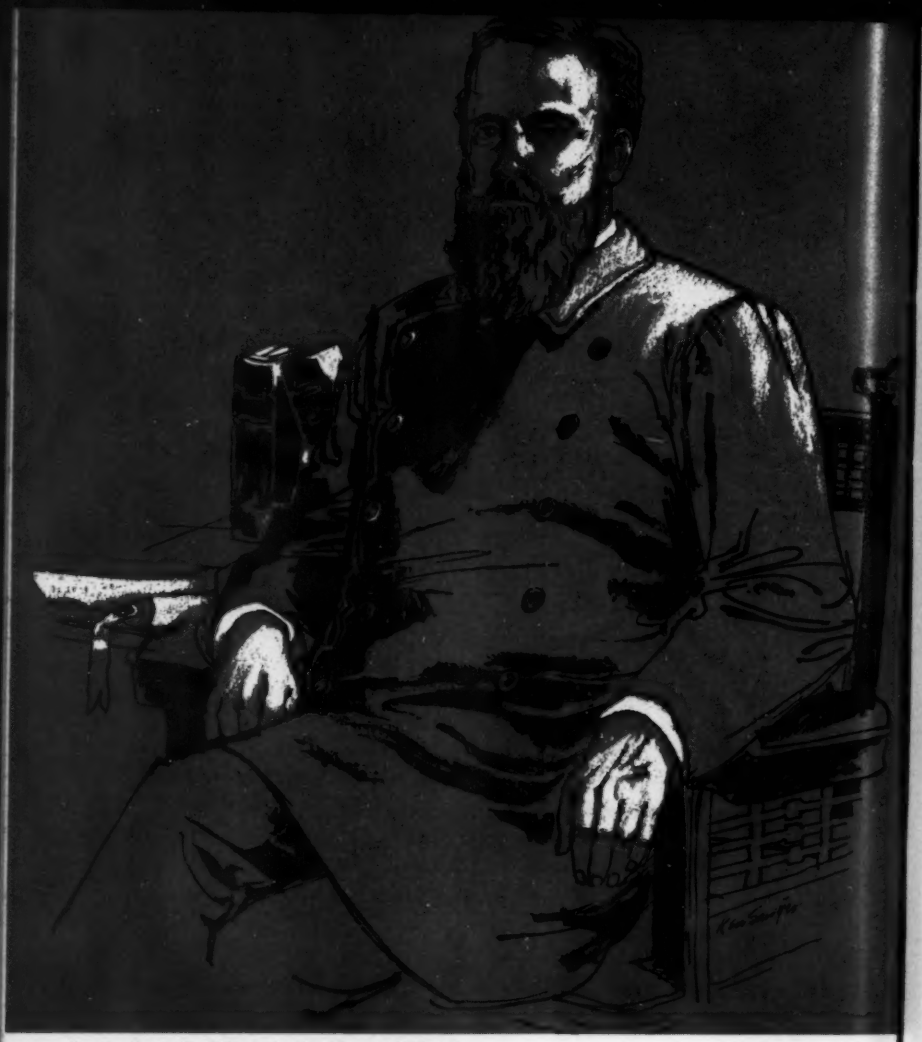
Thus the Property Settlement Agreement drafted in the Plumer case, while permitting the court to exercise its power to modify both the alimony award to the wife and the award for child support in all respects except the one heretofore mentioned, nevertheless rendered unavailable to the wife the process of contempt to enforce *both* the alimony award and the child support award *because of that one exception.*

In low income cases, the net effect of an agreement restricting in any way the court's power to modify the child support and the alimony award payments is to render the entire alimony award and child support award uncollectible, or nearly so, because the weapon of contempt has been removed from the wife and child.

The Plumer case imposes two decisions upon the attorney: First, he must decide the difficult quesiton: Should his client enter into a Property Settlement Agreement at all if the net effect is to remove the power of enforcement of its provisions by contempt? Second, if the answer to the first question is affirmative, then he must decide to prepare the Property Settlement Agreement so that (a) the child support award, and perhaps the alimony award, must be completely separated and made severable from all other provisions of the agreement; (b) it must be made expressly modifiable; and (c) there must be no contractual limitation or restriction imposed by the parties anywhere in the agreement upon the court's power to modify.

The case of Plumer v. Superior Court has, to some extent, placed the legal profession in a dilemma. If the support provision for the wife is part of an integrated bargain agreement, the wife cannot institute contempt proceedings to enforce the support provisions. On the other hand, if the wife wishes to retain the contempt process to enforce the husband's obligation to pay alimony, she must run the risk of coming into court every time the husband claims that his circumstances have changed to warrant a reduction of the alimony award. The net effect of this situation results in increasing the burden upon the already overburdened trial courts with additional litigation, instead of lightening the load of the trial courts, as was so hopefully anticipated in the Dexter and Fox cases.

It is no profundity to declare that litigants want to enter into Property Settlement Agreements, not for the purpose of evidencing their ability to agree, but for the purpose of making agreements that they can enforce against each other. If entering into Property Settlement Agreements results in a removal of the power to enforce by contempt, fewer agreements will be entered into, more litigation will result, the court load will be increased, and the benefits to be obtained by the integrated bargain sale will be seriously reduced.



Fourteenth of a Series Featuring Governors of California

George C. Perkins

Businessman, banker, U.S. Senator... CALIFORNIA'S FOURTEENTH GOVERNOR, 1880-1883

At age 16, he sailed before the mast from his native Kennebunkport, Maine, to California. Here he built a successful career in politics, shipping, banking and milling. As Governor, he placed emphasis on public works—public buildings, institutions. He was elected to his third term in the U. S. Senate in 1903—just before Security Bank set up its Trust Department. Today, its services have been used by three generations of Southern Californians.

TRUST DEPARTMENT

SECURITY-FIRST NATIONAL BANK

Southern California's

REMINISCENCES of the EARLY BAR of LOS ANGELES

PART II

The March issue of the Bulletin contained the first of three installments of an address given by J. A. Graves in October, 1909. Mr. Graves at that time was the Vice President of the Farmers and Merchants National Bank of Los Angeles. From 1876 to 1904 he was a leading member of the Los Angeles Bar.

The reminiscences Mr. Graves relates seem in some respects quite dated. We are somewhat surprised at times at the type of lawyer Mr. Graves chooses to discuss and at the kind of anecdotes he considers humorous. Yet it is this precise "dated" quality which makes these reminiscences interesting to us. The bar of 1909 was not the bar of 1959. Its leaders then might well consider its present leaders a bit stuffy. We might well consider the bar of 1909 as possessed of a strange standard of ethics. Yet what appears quite clearly is that the bar of 1909 had, in general, great admiration for the competent practitioner, great reverence for the law as a profession and a great joy and enthusiasm in its practice. These are qualities which surely are not "dated" in 1959.—The Editor

* * *

By one of those peculiar political accidents which are constantly occurring, Don Pedro Carrillo, a native Californian of distinguished family and appearance, but without legal knowledge or training, was elected Justice of the Peace in this city. In fact, his ignorance of the law was so great, his general understanding so dense, his stupidity so intense, that if he had lived in this age he certainly would have been elevated to the Supreme Bench, or have been made the head of a law school.

He had his Court rooms in the second story of a brick building immediately north of the Cosmopolitan Hotel. The Court room was reached by a wooden staircase outside of the building. The building was owned by the Vigilante Signoret. Carrillo was not very prompt about paying his rent, and when ninety days' rent became due, Signoret took off the lower step of the staircase; ninety days later he took off another step, and again another, so that at

the time I am speaking of, it was quite an acrobatic feat to gain access to "His Honor's" Court. But the Judge was ingenious. He got several dry goods boxes and improvised steps in lieu of those that were taken away. When he was departing from his daily labor, he passed the boxes up to his Constable, who stored them in the Court room, and the Constable then shinned down the old staircase the best way he could. The next morning, with the Justice's assistance, the Constable mounted the stairs, passed out the boxes, and the Judge then ascended.

His office was run on the fee system, and he was a great stickler for his fees. He would swear a witness, and then say, "Hold on a minute; let me charge up that oath." When duly entered in his register of Actions, he would allow the attorneys to proceed. He found out that interpreters were entitled to pay for their services (interpreting was usually from Spanish to English, or vice versa), so he did the interpreting and allowed himself pay for it, charging it up to the litigants.

There was a woman living in Los Angeles, running a beauty parlor. She had a magnificent head of hair, which she wore, when

FEDERAL COURTS CRIMINAL INDIGENT DEFENSE PANEL

The Los Angeles Bar Association recognizes with thanks the following attorneys who served on the Federal Courts Criminal Indigent Defense Panel during March, 1959.

Robert E. Ames
Gerald S. Barton
Meyer Berkowitz
Vincent N. Erickson
Howard Gebler
Nancy Belcher Goodman
Louis W. Graham
John H. Hall
D. Hannekin
Charles M. Hughes
Warren L. Johns
Donald King
Dave Leavitt
Val Linton
Christian E. Markey, Jr.
Rex A. McKittrick
Donald D. Paul
Laurence W. Ritter
Mark P. Robinson
Edward Sanders
Harold J. Sinclair
Samuel L. Sosna, Jr.
William Sternfeld
William G. Tucker
John Virtue
Charles A. Wilson
Marvin Zinman

on the street, in a single braid, and it reached to the bottom of her dress. She was arrested for embezzlement. She came to our office for defense, and Judge Brunson pressed me into service. Her preliminary examination occurred, consuming several days. During her examination, each day, with true Castilian grace and gallantry, the Justice conducted the defendant to the top of the sairs, apologizing for their condition, saying that he was "making some repairs to them, and that the beastly carpenter must be drunk." There was absolutely no evidence upon which to hold her, and I moved for a dismissal of the charge for lack of evidence. After the argument on the motion, Judge Carrillo shook his head, said that "this was a most important matter; that the rights of the State were involved; that there was considerable evidence introduced; that the good of the nation could only be preserved by punishing people charged with crime, and that innocent people were seldom so charged. At any rate, he would give the matter the most careful and serious examination before he decided my motion." Two days afterward, meeting him on the street as I was going home, I asked him to take a drink with me. He put his arm in mine and said, as we were going to a saloon: "Do you know, Graves, that case of yours is making me gray. It has caused me lots of trouble and worry, lots of labor and thinking. Why, I work on it at night. See, I have my book now, taking it home," showing me a law book under his arm. We went into the saloon. He laid his book on the bar to light a cigaret, and, without appearing inquisitive, I got hold of his law book, and behold! it was a well-thumbed first edition of the Political Code of California.

The matter ran on for some time, and finally he met me on the street, took me aside and said: "Graves, I am going to grant your motion and discharge that woman. The District Attorney is very hot at me about it, and I have found great difficulty in writing out an opinion that satisfies my mind and will do me credit. Now, would you object to writing an opinion for me? Have it ready tomorrow so I can copy it, and I will read it next day." I readily assented, got him out an elaborate opinion, quoted him Latin maxims, cited cases, reviewed the evidence, and wound up by declaring the evidence of the prosecution utterly insufficient to justify holding the defendant for trial, dismissing the charge against her, and exonerating her bond. I gave it to him. He looked

it over and said: "My God! Graves; that is a long opinion. Have I got to copy all that?" I told him that it wouldn't look very well to file it in that condition. With much grumbling, he copied it,—and by the way, he wrote a perfect hand, as many of the Spanish people do,—and the next morning, with great dignity, delivered it from the bench, with much better effect than I thought he was able to, and then he had it published in all the daily newspapers.

Some months afterward he got ambitious and wanted the nomination for County Judge. If any one disputed his qualifications for the position, in a most surprised and offended tone he would say: "What! me not qualified? You go and read my opinion in that embezzlement case, and see if I am not qualified." He was not nominated, and that was as near as I ever came to making a Judge.

H. T. Hazard was a member of the firm of Howard & Hazard. He enjoyed a lucrative practice, especially among the native Californians. I think the following story concerning him is worth relating: An utterly disreputable fellow named William Cape, who ran a low saloon and a lower lodging house, but who was extremely useful at election time to certain of our politicians, because of his peculiar ability to deliver his ward to his political friends by a much larger majority than the ward contained residents,—Cape hadn't any property, ran his business from hand to mouth, but notwithstanding this fact, he qualified on a bond for $5000 in a Probate proceeding. The qualification was had before Judge Albert M. Stephens, who was County Judge, with Probate jurisdiction. Knowing the utter financial worthlessness of the man, the oath surprised Stephens, and he looked the matter up and charged the man, before the Grand Jury, with perjury. He was indicted, convicted and sentenced to the penitentiary. Hazard took an appeal for him. He was confined in the County Jail. By trade he was a plasterer. He was allowed the privileges of the place, and he actually plastered all the old Jail building, inside and out, pending his appeal. He even walked around town occasionally, but he kept faith with his political friends and the Jailer, and was always inside at night time. His case was argued by Hazard before the Supreme Court. Hazard was making very poor headway in getting away from the facts. "But," he exclaimed; "But, Your Honors, don't you understand this man signed this bond, for the accommodation of his friend?" "Mr. Hazard," said Chief Justice Wallace, "do you claim that a

man may commit perjury for the accommodation of a friend?" This was a poser for Hazard which he could hardly get around. The case was submitted, and Cape continued to be a handy man around the Jail. When, however, an opinion of the Supreme Court was filed in San Francisco, affirming the judgment, the news was telegraphed here, Cape was informed of it, his cell was left unlocked, and a convenient ladder at hand. He scaled the Jail wall, got to San Pedro, took a coast vessel for British Columbia, and was never heard of again in Los Angeles, and no effort was ever made to retake him.

I do not make the charge that Mr. Hazard had anything to do with Cape's escape. Hazard is an honest man, and would not have done anything involving the slightest moral turpitude.

In these good old days there lived in San Diego a lawyer named Wallace Leach. He possessed as much ability as all the men I have previously mentioned, combined. Dissipated, but industrious, with low instincts, yet not lacking in some admirable traits of character, he was a queer compound of gall and vanity. He was about four feet and a half tall, gracefully built, fair complected, with light hair and beard and blue eyes, neat in his dress, and an extremely good-looking and intellectual-looking little fellow. I heard him make an argument in the Supreme Court in a murder case, from San Diego, which was a most masterly effort. He was listened to with rapt attention by both Court and lawyers present, and after an impassioned plea in closing, he briefly reviewed the circumstances of the killing, the defense being a plea of self-defense, and I can yet hear as plainly as if it were yesterday, his last words, which were, "And now, Your Honor, if that be murder, make the most of it." The Attorney General closed the argument, and Leach left the Court room. He was stopping at the St. Charles Hotel. He went there, and in half an hour was as drunk as a lord, quarreled with the hotel clerk, borrowed a wheelbarrow from the porter, piled his luggage and briefs into the barrow, and started down the street to the United States Hotel, trundling the wheelbarrow and leading a yellow dog by a string. The Supreme Court rooms were over the old Farmers & Merchants Bank Building, and when he came along, Chief Justice Wallace and myself were standing at the foot of the stairs, talking, waiting for my carriage, in which we were going to take a drive. Leach wobbled along, looked

(Continued on Page 190)

TAX REMINDER

DISADVANTAGES IN ELECTING NOT TO BE TAXED AS A CORPORATION

By DEAN S. BUTLER*

When Congress enacted the Technical Amendments Act of 1958 in September of 1958, it was the feeling of a great many tax advisers that the Subchapter S provisions permitting a corporation to elect not to be taxed as a corporation were perhaps the most wide-sweeping tax saving innovation in tax law in the past decade. However, like most extensive changes in the tax statutes, Subchapter S is something of a mixed blessing and has both advantages and disadvantages. The advantages were ably reviewed by William M. Poindexter in the November, 1958 issue of the Bar Bulletin. To complete the picture it is necessary to examine some of the disadvantages which have become more apparent as the Commissioner of Internal Revenue has published rulings and proposed regulations on these provisions.

Qualifying a small business corporation to elect Subchapter S treatment and keeping it qualified presents problems. A qualifying corporation cannot have more than ten shareholders (for the purpose of calculating the number of shareholders in community property states such as California, a husband and wife owning stock as community property are counted as two shareholders), cannot have as a shareholder any person other than an individual or an estate, cannot have a non-resident alien as a shareholder and cannot have more than one class of stock. Neither corporations, partnerships nor trusts may be shareholders. Under the recently issued proposed Regulations under Subchapter S, new shareholders must consent to the election within 30 days after becoming shareholders, in order to keep the election in effect. The Proposed Regulations also provide that when a shareholder dies and his stock passes to his estate, the estate must "elect in" within 30 days after the earlier of qualification of the executor or administrator or the end of the tax year in which the estate became a shareholder, in order to maintain the election. Since the executor or administrator might well insist upon a court order authorizing election-in and

*Chairman of the Taxation Committee, Los Angeles Bar Association 1959-1960.

since obtaining such an order might take time, it is desirable that shareholders in their wills instruct, or at least authorize, their representatives to make the election within the required time. Alternatively, this problem can be eliminated in a buy-and-sell agreement between the shareholders. There is a strong possibility that a corporation having only one class of "stock" but having debt securities resembling preferred stock, or having a comparatively large ratio of debt to equity (a "thin corporation" situation) will be considered to have more than one class of stock and will thereby be disqualified.

Since it is within the power of any shareholder to disqualify a corporation from its right to elect this special tax treatment (by transferring stock to a corporation or non-resident alien, for example) any shareholder can, in effect, blackmail the other shareholders by threatening to have the corporation disqualified (the disqualification being retroactive to the start of the tax year concerned). As discussed below, such unplanned disqualification can have serious adverse effects on the tax situation of the shareholders. The shareholder blackmail problem is best avoided by requiring all shareholders to execute buy-and-sell agreements at the time of the formation of an electing corporation, or at the time of election of an existing corporation. Under these agreements each shareholder can be required to offer his stock to the others before disposing of it in any way which might adversely affect the tax status of the corporation. Agreements such as these are desirable even where there is no danger of intentional blackmail, because of the probability of change in the tax positions of the shareholders

over a period of time (it must be anticipated that at some point the corporate election may be beneficial to some shareholders tax-wise but detrimental to others).

A major problem of electing corporations is the distribution of taxable income to shareholders. If taxable income were all distributed during the year the operations of the corporation might be, and frequently would be, hampered by the drain on its capital. In such a situation if the shareholders were to loan the distributed taxable income back to the corporation in large quantities a thin incorporation situation might well arise and the corporation might be disqualified as having more than one class of "stock." If at some time after a distribution of taxable income but during the same tax year, the corporation were to become disqualified the distribution would be taxed as a dividend to the shareholders in addition to being taxable to the corporation and, being an unplanned dividend, might well have serious adverse tax effects on the shareholders. On the other hand, to the extent taxable income is not distributed to the shareholders it tends to become "frozen" in the corporation, since before accumulated undistributed taxable income from prior years (previously taxed to the shareholders) can be distributed tax-free to the shareholders, current earnings and profits must be distributed in cash. It might well happen that cash distributions this large would not be feasible for the corporation. If the corporation does not need its taxable income to continue operations at an optimum level the problem can be solved by distributing taxable income on the last day of the corporation's tax year, when there is no danger of becoming disqualified for the year. If it is necessary to retain earnings in the corporation for expansion, etc., it will apparently be necessary to risk having taxable income frozen in.

An overall conclusion that may be drawn regarding elections not to be taxed as a corporation is that a corporation making such an election will require careful and continued attention by its attorneys and accountants, both in conducting its day to day operations and in planning, not only to obtain the maximum benefit from the election but to avoid the serious adverse consequences of "falling out" of the election, freezing in taxable income, etc. Subchapter S provides a most useful tax device, for the proper situation, but one which must be handled very carefully by the corporation's financial advisers.

Opinion of the Committee on Legal Ethics Los Angeles Bar Association

OPINION NO. 253

November 7, 1958

ATTORNEY AND CLIENT. Delivery of File to Client Upon Termination of Employment; Effect of Promise by Succeeding Attorney to Return File Made to Former Attorney.

The Committee has been asked to render an opinion on the following facts and question:

> Two attorneys, A and B, are involved with C who formerly was the client of A but now is the client of B. A delivered to B a complete file pertaining to a matter of the client previously handled by A. The file consists of pleadings, copies of letters by and from A to C and to third persons. Also in the file are letters from C and from third persons to A, accountings, pencilled notations (not stated whether the pencilled notations are those by A or those made by C), property settlement agreements (A being trustee for C), and other unspecified documents. The said file was delivered by A to B upon B's promise to return the file to A. When C learned that B had promised A to return the file to A, C then specifically instructed B not to return "a single document or any copy thereof" to A.
>
> It further appears that A is suing C for an attorney's fee in court actions pending in Los Angeles and Las Vegas, incident to which A has attached certain properties of C. C has also instituted a suit against a corporation and A is appearing in that suit in defense of the corporation. Ill will predominates between A and C.
>
> The question arising out of these facts is whether B should keep his promise to A and return the entire file to him or heed the instruction of C, who is now B's client, and decline to return the file to A and thus repudiate his promise to A given when he received the file from A.

There are several important ethical principles which must be kept in mind in attempting to answer this question.

It is important to remember the admonition that an attorney's first duty is to his client (see Drinker, Legal Ethics page 196) and that an attorney must do nothing that will prejudice the interest of his client (Drinker, Legal Ethics page 59). The foregoing admonitions in a matter such as is presented in the instant case, how-

ever, are to be considered in the light of another admonition to the lawyer in his relations with and representation of the client contained in Canon 15 (Canons of Professional Ethics of the American Bar Association) as follows: ". . . he must obey his own conscience and not that of the client." Again in Canon 18 it is stated, ". . . the client cannot be made the keeper of a lawyer's conscience in professional matters . . ."

In considering the attorney's duty to the client there should also be kept in mind the ethical principle that a lawyer should not repudiate a promise or oral stipulation given to an opposing attorney even though the client insists he shall not honor an oral stipulation. (Drinker page 195 and footnotes). This principle is illustrated by the situation where defendant's attorney moved without leaving an address but plaintiff's attorney actually knew the whereabouts of defendant's attorney,—plaintiff's attorney should notify defendant's attorney of the date of trial despite plaintiff's instructions to his attorney not to do so (Drinker page 195 and quotation from Sharswood, Professional Ethics Page 74-75).

Applying the above principles to the facts of this case it is apparent that the client's rights must not be disregarded but in protecting his rights he may not expect the lawer to violate his promises made in good faith to or act unethically toward his fellow lawyer.

Although there appears to be no canon of legal ethics of the American Bar Association or any opinion of the Committee on Professional Ethics and Grievances of the American Bar Association directly in point, nor do any of the Rules of Professional Conduct of the California State Bar answer the question propounded here, we do find some assistance from Opinion 197 of this Committee rendered in 1952. The question raised and answered in Opinion 197 pertained to the duty of an attorney to deliver his office file of a case to his former client or to succeeding counsel. The former attorney's office file contained copies of pleadings drafted and filed by the attorney, copies of pleadings by adverse parties, possibly copies of letters by and letters addressed to the attorney, and copies of briefs prepared by him for his use in representing the client. The opinion concludes that an attorney, while under no legal duty to deliver his office file to his former client or succeeding counsel, nevertheless should permit inspection and

copy of the file or make a temporary loan of the file. The facts upon which that Opinion was based are quite similar to the instant case except there was absent in that case the important additional fact appearing here, to wit, the promise exacted by A of B that B would return the file to A. It may be fairly inferred that A would not have delivered the file to B had not B promised to return the file to A. From the facts here presented it appears that much of the file is comprised of the work product of A. However, the Committee has taken into consideration that the file may contain some papers which belong to the client, but feels this does not alter the conclusion herein reached.

The 1952 Opinion was rendered under a less compelling situation than exists in the instant case. Here there is the very important added element of B taking delivery of the file from the former lawyer, A, upon an expressed promise to return it to him. The client asks that the second lawyer, B, repudiate his promise to A, which this Committee believes the client has no right to demand. The references above to Drinker on Legal Ethics and to the above quoted portions of the Canons of the American Bar Association seem under the facts of this case to compel the answer to the question propounded in this case that B should return the entire file to A. Nothing herein affects the legal rights of the client to recover such papers as may be his. There may be circuity in causing the client to go to attorney A for his papers rather than requiring that attorney B deliver them directly to the client but in spite of such circuity the Committee feels that under the facts here presented the entire file should be returned to A.

This Opinion, like all opinions of this Committee, is advisory only (By-Laws, Art. X, Sec. 3).

What's Doing Around the County

(The Bulletin hopes to run this column each month. Affiliated Associations are invited to send in items of interest.)

LAW DAY: Law Day will be celebrated throughout the county on May 1. Many associations have programs planned.

BEVERLY HILLS BAR ASSOCIATION:

The Beverly Hills Bar Association, joined by the Beverly Hills Chamber of Commerce, is making active plans for Friday, May 1, 1959, which day has been proclaimed Law Day by Mayor Davis of Beverly Hills. The ceremonies will take place on the steps of the Beverly Hills City Hall at 12:30 P.M. on May 1, and will feature introductory remarks by Harry E. Sokolov, Chairman of the Law Day Committee, Judge Lester Roth, President of the Beverly Hills Bar Association, and Jack Freeman, President of the Beverly Hills Chamber of Commerce. The featured address will be given by Goodwin J. Knight.

LOS ANGELES BAR ASSOCIATION:

The next Association golf tournament is scheduled for May 6 at Santa Anita County golf course. For further information, call Lou Most, Golf Committee Chairman, at BR 2-5111 or CR 5-5111.

Recent Buyer to Title Officer:

"I understand that you were the title officer who supervised the title search on the land I bought recently. I'm getting married next week and I'd like to put a homestead on it right away so that when we both move in we will be protected. This form I bought—do I just fill in the blanks and record it?"

Title Officer:

"No, that wouldn't do. Most laymen think of a homestead as a do-it-yourself project on a blank form they buy at a store.

"Actually, there have been a good many surprises for people because of the unexpected consequences of a homestead. Why don't you go see the same lawyer who helped you on that recent lease—you said you liked him—and tell him your plans."

HOME OFFICE and INTER-COUNTY DEPARTMENT
530 West Sixth Street • Los Angeles 14 • MAdison 7-611

Brothers-In-Law

By George Harnagel, Jr.

George Harnagel, Jr.

Moving from a house that we have lived in for twenty-five years is a chore I wouldn't care to undertake every other day. There are some compensations, however, in addition to getting into the new home. For example, there is the antique $5 bill that fell out of an old copy of *Kitchener's Mob.* (This is likely to result in a revival of interest in reading at our house.) More important, there is the rediscovery of the indispensable one-volume law library which I picked up in a second hand store a few years ago for 5¢ and then promptly mislaid.

The encyclopedic scope of this little gem is modestly suggested by its title: *Laws of Business for All the States and Territories and the Dominion of Canada with Forms and Directions for All Transactions, and Abstracts of the Laws of All the States and Territories on Various Topics.* The author is Theophilous Parsons, LL.D., "late Professor of Law in Harvard University." It originally appeared in 1878, but I was fortunate to get a recent (1902) edition. If you get involved in problems of apprenticeship or the law of manure (does it pass with a conveyance of the freehold, etc., etc.?) and find that Corpus Juris Secundum is a little weak on those once lively subjects, I'll be glad to give you the benefit of Professor Parsons' views.

* * *

Bar Association dues, like everything else, are going up. A special committee of the **Brooklyn** Bar Association was appointed several months ago to study the Association's finances with a view to recommending an increase in membership fees if it thought that was necessary. Probably to no one's surprise it recommended an increase, from the present $25 a year to $35 a year. It is of interest to note in the committee's report that back in 1890, when the Association was organized, the annual fee was $5.00; that it was

increased by stages to the $25 level, which was reached in 1926; and that there have been no increases since that relatively remote date.

The committee observes that various local bar associations in neighboring areas are getting along with dues of from $20 to $25 a year, but notes that they do not maintain their own building, as does the Brooklyn Association. Presumably to make the proposed increase more palatable the committee points out that the **Philadelphia** Bar Association has increased its dues from $40 to $55, and that the members of the Association of the Bar of the **City of New York** pay $100 a year.

The **Massachusetts** Bar Association for several years has made available to high schools in that state a "Massachusetts Heritage Program." Typically this involves a presentation by members of the local bar of high school assembly programs dealing with citizenship responsibilities.

The Association of the Bar of the **City of New York** operates a stenographic bureau in its Bar Building for the convenience of its members.

* * *

On May 17 the **Virginia** State Bar will conduct ceremonies at Jamestown commemorating the arrival there of English colonists in 1607. Included in the program will be the unveiling of a plaque marking the advent of the common law to the New World and addresses by Governor Almond of Virginia, Sir Harold Caccia, British Ambassador to the United States, and President Malone of the ABA.

* * *

The Board of Governors of the **Illinois** State Bar Association has unanimously voted "to vigorously oppose" any legislation intended to excuse newspaper reporters from being required to disclose the sources of their news stories.

* * *

Wanted: An attorney to work in office in small town in northwestern Wisconsin for man now operating alone. Future partnership in store if satisfactory. You won't get rich, but the fishing and hunting is good. Write Box K, State Bar headquarters.—From the *Wisconsin Bar Bulletin.*

* * *

Chicago's television station WTTW is broadcasting a college credit course in business law. It is taught by John T. O'Keefe of the Chicago bar for the Chicago City Junior College.

* * *

If all the people now on the Federal civilian payroll lived with their families in one new city, it would be the second largest city in the United States, according to the National Association of Manufacturers.

REMINISCENCES OF THE EARLY BAR OF L.A. . . .

(Continued from Page 176)

up at Judge Wallace, sat down his wheelbarrow, and called to him. "Hello, Judge; get on and ride," waving his hand toward the wheelbarrow. The Judge declined the invitation, told him he was so heavy he would break down the barrow. Leach took hold of the handles, started off again, and said, "Oh, hell! you're not a dead game sport," and proceeded on his way.

With all his faults, he was an extremely kind-hearted man. He and A. B. Hotchkiss of San Diego had a fight in the Court room and were not upon speaking terms. Shortly after this, a meeting of the Bar Association of San Diego was held. It took steps to disbar Hotchkiss for accepting a bribe, while District Attorney, from John G. Downey and Louis Phillips, in consideration of which he dismissed a tax suit against them. The Bar appointed Judge Chase (Leach's law partner), Judge Luce, and I think one other attorney, to prosecute Hotchkiss. Leach immediately bounced up, said he believed in fair play, and that, having appointed a committee to prosecute this unfortunate man, it was the duty of the Bar Association to appoint another committee to defend him. The lawyers present disagreed with him and declined to appoint such a committee. "All right," said Leach; "then I will defend him," and he turned in and worked on that case as he never worked for any man before. Judgment was rendered against Hotchkiss in the Court below, and an appeal was taken to the Supreme Court. Judge J. S. Chapman assisted Leach in this appeal, and on a point sprung by him—Chapman—namely, that the information against Hotchkiss had been improperly verified, the Supreme Court reversed the judgment.

The spasm of virtue which had seized the San Diego Bar had by this time oozed out, and no further prosecution of the case was ever had. Before this case was tried, Mr. W. J. Hunsaker, then a law student in either Chase's or Luce's office, came to Los Angeles to take the deposition of Louis Phillips, who was supposed to have paid Hotchkiss the money. The deposition was to have been taken by Wilse Potts, County Clerk. Hunsaker had subpoenaed Phillips, paying him his per diem and mileage, and had him in attendance before a deputy clerk named Charlie Judd, whom Potts had delegated to act for him, he being engaged before

the Board of Supervisors. Judd was in a constant state of inebriety, and that day his breath smelled like a still-house with the roof blown off. I appeared, at Leach's request, for Hotchkiss. Phillips was sworn, and the first question Hunsaker put to him I objected to on the ground that Hunsaker was not an attorney of the Superior Court of the State of California, in and for Los Angeles county, California, of which Potts was Clerk. Deputy Clerk Judd at once assumed judicial functions, leered at Hunsaker, and in a thick and husky, alcoholic-laden voice said, "Mr. Hunsaker, have you been admitted to this Bar?" Hunsaker said he had not. "Then you cannot practice in this Court. Objection sustained," and the hearing came to an end. Being only too anxious to get away, Phillips fled, and Hunsaker returned to San Diego, and the deposition never was taken. I never see or think of Hunsaker but what I mentally apologize for the outrage perpetrated on him.

I was in the District Court room in San Bernardino county one hot summer day. Some San Diego Jewish merchants, whom Leach represented, had attached some cattle in that county. Certain parties replevined the cattle, claiming to own them. This claim and delivery action was being tried before a jury, with the late W. R. McNealy, of San Diego county sitting as Judge in San Bernardino county. A local attorney represented the plaintiff, and Leach the defendant. All during the trial this attorney tried to bulldoze Leach, but, figuratively speaking, Leach simply walked all over him. In his address to the jury, plaintiff's attorney used up all of his time lambasting the Jews—these Jews in particular, and all Jews in general. Leach replied to him in a close, clear, forcible argument, making every point in the case in a most intelligent and winning manner. He then proceeded to reply to counsel's attack upon the Jewish race, and he paid those people the most beautiful tribute that it was ever my pleasure to listen to. He traced the history of the Jewish race from its earliest beginning; showed how they had been persecuted; how they were denied the privilege of owning real estate, and were compelled to be merchants, possessing only property which could be moved upon a moment's notice; dwelt upon their many admirable traits of character, the success achieved by them under the most difficult circumstances, and the high standing that they had attained throughout the world. He could not, however, resist the chance for a joke, and, suddenly descending from the sublime to the ridiculous, he said, "And com-

ing down to our own times and our own people, what other race of men on the face of God's green earth, except the Jews, could sell a forty-dollar suit of clothes for eight dollars, and get rich at it?" The jurymen were mostly farmers, sitting there with their coats off, and they literally howled with delight. Judge McNealy in vain pounded his desk and rapped for order, and it was some time before Leach could proceed. A verdict was promptly rendered, when the case was submitted, in favor of Leach's client.

Leach, in a state of intoxication, was thrown from a horse which he was attempting to ride, and after lingering for some time, died of his injuries so received.

. . . to be continued

RETURN POSTAGE GUARANTEED
241 E. 4th Street
Los Angeles 13, Calif.

CAROLINE BREDE F.U.L.
PRINCIPAL LIBRARIAN-LAW SCHOOL
UNIVERSITY OF MINNESOTA
MINNEAPOLIS 14, MINNESOTA